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STATUTORY PROVISIONS:

No. 89-624

In The

Supreme Court of the United States

October Term, 1989

MAISLIN INDUSTRIES, U.S., INC., ET AL.,
Petitioners,

v.

PRIMARY STEEL, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AMICUS CURIÆ BRIEF
OF SUPREME BEEF PROCESSORS, INC. IN SUPPORT OF RESPONDENT

Supreme Beef Processors, Inc., respectfully submits its Brief as *Amicus Curiæ* in support of Respondent.

INTEREST OF *AMICUS CURIÆ*

Supreme Beef Processors ("Supreme Beef") is a processor and shipper of ground beef and related products, headquartered in Dallas, Texas. Supreme Beef is the Petitioner in Case No. 88-1958, *Supreme Beef Processors, Inc.* v. *Robert Yaquinto, Jr., Trustee for Caravan Refrigerated Cargo, Inc.*, currently pending on Petition for Certiorari before this Court. Following the filing of the Petition in that case on May 30, 1989, the Court on October 2, 1989, entered an order inviting the Solicitor General to file a brief in that proceeding expressing the views of the United States. The Solicitor General in

December, 1989, filed a brief indicating that the issues in No. 88-1958 were largely identical to those in the instant proceeding and taking a position in support of both Supreme Beef in No. 88-1958 and the Respondent, Primary Steel, Inc. ("Primary Steel") in the instant proceeding. The Solicitor General, however, stated that the procedural posture of the instant case made it a preferable vehicle for Court review. He accordingly recommended that the Court grant certiorari in the instant case and hold No. 88-1958 in abeyance to be decided in accordance with the outcome of this case.

The factual and legal issues involved in No. 88-1958 are virtually identical to those in the instant proceeding. In both cases, the non-carrier parties were shippers who had negotiated with motor common carriers to have particular rate levels applied to their shipments. In both cases, the carriers induced the shippers to use the carriers' services by representing that they could perform service for the shippers at specified rates. In both cases, the carriers billed and collected based upon the negotiated rates. In both cases, the shippers received no indication from the carriers that the rates quoted, billed, and collected were not filed with the Interstate Commerce Commission ("ICC"). Much later, after the carriers had ceased operations through bankruptcy, the same collection agency, Carrier Credit and Collection, Inc. (itself now bankrupt), brought actions against both shippers on behalf of the carriers' respective bankruptcy trustees to collect "undercharges." These actions were based upon the higher tariffs which had remained on file because of the carriers' failures to file the lower rates which they had promised the shippers.

The collection action against Supreme Beef was filed in the United States Bankruptcy Court for the Northern District of Texas. Like Primary Steel, Supreme Beef

filed affirmative defenses alleging that collection of charges based on tariffs which had remained on file only through the carrier's misrepresentation or negligence should be found to be an unreasonable practice prohibited by 49 USC. § 10701. Unlike the court in *Primary Steel*, however, the court in *Supreme Beef* declined to permit referral. Rather, summary judgment was entered in favor of the carrier based on the higher tariff levels which the carrier had promised to cancel.

Supreme Beef's motion for referral relied extensively on a then-pending proceeding before the ICC in which a major national transportation organization, The National Industrial Transportation League, had sought promulgation of a rule by the ICC declaring assessment of published rates to be unreasonable under circumstances similar to those alleged by Supreme Beef. Ex Parte No. MC-177, *National Industrial Transportation League – Petition To Initiate Rulemaking on Negotiated Motor Common Carrier Rates* ("*Negotiated Rates*"). On October 29, 1986, ICC issued its first decision in that proceeding at 3 ICC 2d 99 ("*Negotiated Rates I*"). The ICC stated that Congress in the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793, had amended the National Transportation Policy to require the ICC to promote competitive, innovative, and individualized price and service options to meet changing market demand. Pub. L. 96-296 § 4; 49 USC § 10101 (a)(7). *Negotiated Rates I, supra*, at 3 ICC 2d 105. The ICC noted that passage of the 1980 Act allowed it to eliminate prohibitions against rates applicable to only one shipper, permit common carrier rates to be filed on short notice, and permit common carriers to perform service as contract carriers as well. *Id.* at 105, 106.

The ICC also stated that with increased competition under the 1980 Act, shippers and carriers were called

upon to negotiate hundreds or even thousands of individual motor common carrier rates daily. *Id.* at 105. Such increased competitive activity made it extremely difficult for shippers to determine prior to movement whether agreed rates actually were on file. It also placed greater importance on the accuracy of carriers' representations concerning their rate levels. *Id.* at 105, 106. Because of these circumstances, the ICC stated that, under appropriate circumstances, it would find that carrier attempts to collect their published charges would be found to constitute unreasonable practices in violation of 49 USC § 10701(a), where the carrier had negotiated a lower rate with the shipper and had indicated that the negotiated rate would be the one charged and filed as a tariff. *Id.* at 107.[1]

Following the lower court's denial of referral to the ICC, Supreme Beef filed an appeal in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the lower court in *Supreme Beef Processors, Inc.* v. *Yaquinto*, 864 F2d 388 (5th Cir. 1989). The decision of the Fifth Circuit is totally contrary to the decision of the Eighth Circuit under review in this case. The Fifth Circuit held that carrier practices of the type encountered by both Supreme Beef and Primary Steel could not constitute a defense to a motor carrier action to collect published freight charges. The Fifth Circuit stated that allowing such a defense to be asserted and referred to the ICC for decision would create an exception to the requirement of 49 USC § 10761 that carriers

[1] On June 29, 1989, the ICC issued a supplemental decision reviewing and clarifying its earlier decision in *Negotiated Rates I*. This decision, Ex Parte No. MC-177, *National Industrial Transportation League – Petition To Initiate Rulemaking on Negotiated Motor Common Carrier Rates*, 5 ICC 2d 623 (1989) ("*Negotiated Rates II*") reemphasizes the ICC's concern with carrier practices of the type faced by Supreme Beef and Primary Steel. *Id.* at 621-634.

must collect their filed tariff charges. *Id.* at 392. The court rejected decisions such as *Seaboard System R.R.* v. *United States*, 794 F2d 635 (11th Cir. 1986) and *Western Transportation Co.* v. *Wilson Co.*, 682 F2d 1227 (7th Cir. 1982), upholding exclusive ICC jurisdiction over unreasonableness of carrier rates and practices and affording shippers a right to ICC consideration of such issues as defenses to carrier collection actions. The court also found that allowing such defenses would be contrary to prior Fifth Circuit decisions requiring payment of freight charges pending evaluation of their reasonableness by the ICC, citing *Southern Pacific Transp. Co.* v. *City of San Antonio*, 748 F2d 266 (5th Cir. 1984). *Id.* at 391-92.

Supreme Beef, like Primary Steel, the Solicitor General, and the numerous other *amici*, submits that decisions such as that of the Fifth Circuit simply are legally incorrect. Such decisions deprive shippers of their right to protection against unreasonable motor carrier practices guaranteed by 49 USC § 10701(a). Supreme Beef's purpose in submitting this Brief is to underscore the need for a decision from the Court which will clearly overrule these cases and affirm the right of shippers to the referral process afforded to Primary Steel by the courts and the ICC.

SUMMARY OF ARGUMENT

The provisions of 49 USC § 10701(a) require the practices of motor carriers subject to the jurisdiction of the ICC to be reasonable. The ICC under this statute has powers broad enough to cover any unreasonable practice of a motor common carrier. Such practices specifically include those relating to carrier rates. Both the courts and the ICC have held that shippers injured by

unreasonable carrier practices are entitled to raise such issues in court proceedings and then seek determinations from the ICC entitling them to recovery of money damages for the practices found to be unreasonable.

While 49 USC § 10761 also requires that carriers collect charges according to their published rates, application of the ICC's reasonableness powers to such published rates can operate to set aside either those rates or their application. The doctrine that *courts* are not empowered to set aside a published rate in no way limits the power of the ICC to do so. The ICC's Policy Statement in *Negotiated Rates I* and *II* is totally in accord with 80 years of judicial interpretation of the Interstate Commerce Act. The Court should affirm the decision of the Eighth Circuit in this proceeding.

ARGUMENT

I.

THE ICC IS EMPOWERED BY STATUTE TO DETERMINE THAT THE CARRIER CONDUCT IN THIS CASE CONSTITUTES AN UNREASONABLE PRACTICE PROHIBITED BY 49 USC § 10701(a), THUS BARRING COLLECTION OF FREIGHT CHARGES RESULTING FROM THAT CONDUCT.

The fundamental issue for decision by the Court is whether the long-exercised statutory power of the ICC to declare motor carrier rates or their collection unreasonable may be negated by over-extension of the statutory requirement that carriers initially charge their published rates. The policy announced by the ICC in *Negotiated Rates I* and *II* and applied in many succeeding cases is an exercise of the long-established statutory powers of the ICC, currently codified at 49 USC § 10701(a), to declare that application of rates in

carrier tariffs may constitute unreasonable practices. Such findings require that court actions for collection based upon such rates must be dismissed.

Petitioners' position before this Court ignores this important statutory function of the ICC. Rather, Petitioners would extend case precedents which bar courts from considering misrepresentation, fraud, or prior agreement as defenses to the collection of published charges to bar *the ICC* from considering such factors in the exercise of its powers over unreasonable practices under 49 USC § 10701(a). Such a theory represents a perverse statutory construction which this Court should not allow. In the words of the Eleventh Circuit, prior to the inception of the present controversy, "the courts [had] never held that the ICC lacks authority to prohibit the unreasonable collection of undercharges." *Seaboard System R.R., Inc.* v. *United States, supra*, 794 F2d at 638.

This Court frequently has noted that the powers granted to the ICC to prohibit unreasonable carrier practices are extremely broad. The ICC's recodified statutory powers at 49 USC § 10701(a) are derived from prior statutes affecting both rail and motor carriers. The statute states that the ICC's reasonableness powers extend to "any practice related to transportation or service provided by a carrier." The predecessor to this provision originally enacted by Congress in 1906 emphasized the breadth of these powers even more strongly, applying them to "any regulations or practices whatsoever" of a carrier affecting common carrier rates and charges. *Interstate Commerce Commission* v. *Illinois Central Railroad Co.*, 215 U.S. 452, 475 (1910). The ICC itself has construed its unreasonable practices powers as "broad enough to cover any unreasonable practice of a common carrier" and controlling "whatever regulations and practices" enter into the application of

carrier rates. *Postal Telegraph Cable Co.* v. *W.U. Telegraph Co.*, 59 ICC 512, 516 (1920); *Stopping Of Cars in Transit to Complete Loading*, 36 ICC 130, 132 (1915).

The categories of carrier conduct which the ICC has found to constitute unreasonable practices range across the entire spectrum of transportation activities having an impact on the charges ultimately paid by shippers. Very early in its existence, the ICC held that it could be an unreasonable practice for carriers to publish rate provisions and billing documents which were likely to mislead the shipping public or suggest that rates higher or lower than those actually on file would be charged. *In The Matter of Released Rates*, 13 ICC 550, 562, 564 (1908). The ICC has repeatedly held that the fact that a rate is contained in a published tariff and is found to be reasonable in its own right does not prevent application of that rate from constituting an unreasonable practice in particular circumstances. *National Wool Growers Association* v. *Union Pacific R. Co.*, 49 ICC 55, 58 (1918); *Albers Bros Milling Co.* v. *Great Northern Ry. Co.*, 256 ICC 491, 500 (1943). Both this Court and the ICC have held that shippers injured by unreasonable carrier practices are entitled to recovery of money damages from the carriers involved. *Hewitt-Robins* v. *Eastern Freight-Ways*, 371 U.S. 84 (1962); *Adams* v. *Mills*, 286 U.S. 397, 407-8 (1932); *Bud Antle, Inc.* v. *United States*, 593 F2d 865, 875 (9th Cir. 1979); *Pensick & Gordon, Inc.* v. *California Motor Express*, 323 F2d 769 (9th Cir. 1963), *cert. den.*, 375 U.S. 984 (1964); *Albers Bros. Milling Co.* v. *Great Northern Ry. Co.*, *supra*, 256 ICC at 500; *Hawkins & Sons* v. *Director General*, 80 ICC 225, 227 (1923).

Petitioners' argument in declining to recognize the power of the ICC to find that continuing rate misrepresentation constitutes an unreasonable practice urges

in effect either that (1) the ICC lacks power to find that assessment of a published rate constitutes an unreasonable practice or (2) the practices alleged by shippers such as Primary Steel or Supreme Beef and noted by the ICC in *Negotiated Rates I* and *II* could never be found to be unreasonable within the meaning of 49 USC § 10701(a). Both of these propositions are patently untenable. From the very onset of regulation, the ICC has exercised its powers to declare carrier rates and practices unreasonable to relieve shippers from their obligation to pay published carrier charges. This fact is imbedded in the very quotation of Justice Hughes recited by the Petitioners in support of the primacy of filed rates (Petitioner Br. at 10). The full statement of law by Justice Hughes explaining the interrelation between the ICC's reasonableness powers and the duty of carriers to collect their published charges reads as follows:

> The rate of a carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the commission to be unreasonable.* Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. The rule is undeniably strict, and it may work hardship in some cases, but it embodies the policy which has been adopted by Congress in regulation of interstate commerce in order to prevent unjust discrimination. *Louisville & Nashville Ry.* v. *Maxwell*, 237 U.S. 94, 97 (1915) (emphasis added).

Petitioners' suggestion in their brief that shippers lack a "legally cognizable right to a non-tariff

rate"[2] ignores the numerous court decisions differentiating between the "legal rate" contained in the carrier's tariff which the carrier is initially required to charge and the "lawful rate" ultimately established by an ICC decision following a shipper objection that the "legal rate" was unreasonably high. *Arizona Grocery Co.* v. *Atchison T. & S. F. Ry. Co.*, 284 U.S. 370, 384 (1932); *Middlewest Motor Freight Bureau* v. *U. S.*, 433 F2d 212, 238-39 (8th Cir. 1970), cert. den., 402 U.S. 999 (1971). It is only the lawful rate which the shipper is required to bear. Petitioners simply are wrong in their assertion that the "filed tariff doctrine" created by 49 USC § 10761 bars the ICC from finding a tariff or its application to be unreasonable so as to allow a shipper to avoid payment of the charges contained in that tariff.

There similarly is no merit to any argument that the unreasonable practice defenses raised by shippers under 49 USC § 10701 must be rejected because of inconsistency with the rate filing requirements of 49 USC § 10761. The fact that the claimed unreasonable practice involves fraud or misrepresentation in description of the carrier's legally effective rates does not constitute a bar to the ICC's exercise of its unreasonable practice jurisdiction. The line of cases which holds that fraud, misrepresentation, or other equitable defenses may not be asserted in carrier actions to collect published rates applies only to those situations where shippers seek to invoke the powers of equity granted to *courts*. No similar prohibition, however, applies to the ICC. Under the ICC's reasonableness powers, the same facts which could not be asserted as a common law or equitable defense to payment of freight charges in a court proceeding may constitute a basis for the ICC to find either that published rates themselves are un-

[2] Petitioner Br. at 13.

reasonable or that the collection of such rates would be unreasonable.

The decisions of the ICC and the courts are replete with examples of situations in which equitable circumstances which could not be asserted as common law defenses to collection of filed rates in court proceedings have been found to support ICC findings of unreasonableness. For example, even before the effectiveness of deregulation legislation concerning the rail and motor carrier industries in 1980, the ICC had recognized that public policy considerations concerning rail rates warranted a presumption that any published rate in excess of the rate agreed upon between a carrier and shipper and relied upon the shipper would be unreasonable. Ex Parte No. 358-F *Change of Policy, Railroad Contract Rates*, 45 Fed. Reg. 21719 (April 2, 1980, reported in *Cleveland Cliffs Iron Co.* v. *ICC*, 664 F2d 568, 573 (6th Cir. 1981)). See also, *Coal Colstrip, Kuehn and Decker, MT, To Superior Wi*, 364 ICC 152 (1980); *Unit Train Rates – Coal Burlington Northern, Inc.*, 364 ICC 186 (1980) *affd. sub nom Iowa Power and Light Co.* v. *Burlington Northern, Inc.*, 647 F2d 796 (1981) cert. den., 455 U.S. 907 (1982); *Annual Volume Rates on Coal – Flint Creek, AR*, 364 ICC 753 (1981), *affd. sub nom. Burlington Northern, Inc.* v. *United States*, 679 F2d 915 (1982).

Many prior decisions of the ICC also had recognized that an agreement between a shipper and a carrier to charge particular rates could be given evidentiary effect in determining whether higher published rates should be found unreasonable. *Piedmont Mills, Inc.* v. *Norfolk & W. R. Co.*, 296 ICC 481, 485 (1955) (carrier misquotation and acceptance of lower charges over 3-year period); *Ideal Cement Co.* v. *Atchison, T. & S. F.*, 280 ICC 55, 59 (1951) (confusing tariff and carrier offer to

establish clarifying tariff); *Carson Iron & Steel Co.* v. *Atlantic & N. C. R. Co.*, 237 ICC 724, 728 (1940) (carrier error in tariff publication); *Sheboygan Fruit Box Co.* v. *Chicago & N. W. Ry. Co.*, 214 ICC 157 (1936) (mutual assumption that cancelled rate had remained in effect); *Sutherland Paper Co.* v. *Ann Arbor R. Co.*, 215 ICC 344 (1936); *Armour & Co.* v. *Northern Pacific Ry. Co.*, 209 ICC 277 (1935); *C. A. Wagner Construction Co.* v. *Chicago & N. W. Ry. Co.*, 208 ICC 767 (1935) (emergency need to move shipments before agreed rate could be placed in effect).

In still other cases, the ICC had found that it would be an unreasonable practice to apply published tariffs in particular transportation circumstances. *Thermofil, Inc.* v. *Jones Transfer Co., supra*, 355 ICC 828 (charges for trailer use by carrier not owning trailer); *Iowa Beef Processors, Inc.* v. *Western Transportation*, ICC Docket No. 37521 (not printed; September 14, 1981), cited in *Western Transportation Co.* v. *Wilson & Co., supra*, 682 F2d at 1231; *Standard Brands, Inc.* v. *Central R. Co. of N. J., supra*, 350 ICC 555 (document notation requirement unrelated to transportation service).

Even prior to *Negotiated Rates I*, the Eleventh Circuit had given specific approval to the ICC's determination that carrier conduct with respect to a published tariff could constitute an unreasonable practice barring application of that tariff. In *Seaboard System R. R.* v. *United States, supra*, 794 F2d 635, the Eleventh Circuit reviewed an ICC decision[3] in which a carrier advised a shipper that a particular rate would be charged based on what the Eleventh Circuit described as a "somewhat unclear published tariff." *Id.* at 636. Closer analysis of the tariff, first by the carrier and then by the ICC,

[3] *Buckeye Cellulose Corp.* v. *Louisville & Nashville R. R. Co.*, 1 ICC 2d 767 (1985).

revealed, however, that the tariff was unambiguous and provided for a higher rate than had been quoted and agreed to. The court in *Seaboard* noted that the critical factor for the ICC was "the carrier's continuing conduct in misleading the shipper as to the applicable tariff rate." *Id.* at 639. When the carrier advised the shipper that it had changed its interpretation of the tariff, the ICC ruled that the unreasonableness of the carrier's practice came to an end. *Id.* The Eleventh Circuit confirmed the statutory power of the ICC under 49 USC § 10701(a) to "prohibit the unreasonable collection of undercharges." *Id.* at 638.[4]

The policy announced by the ICC in *Negotiated Rates I* and *II* is a logical extension of these previously exercised powers. The ICC noted that the primary evil which the tariff filing requirement of 49 USC § 10761

[4] While apparently conceding that *Seaboard* was correctly decided, Petitioners attempt to distinguish it by reference to differences between the rail and motor carrier portions of the underlying statute. Petitioners contend that the rail provisions authorize the ICC to find unreasonable practice violations on past shipments while the motor carrier provisions do not (Petitioner Br. at 17). In reality, there is little difference between the statutory language. The rail language [at 49 USC § 10704(a)(1)] permits the ICC to "order the carrier to stop the violation," while the motor carrier language [at 49 USC § 10704(b)(1)] permits the ICC to "prescribe the • • • practices to be followed." Construing the motor carrier statute as not pertaining to past shipments, moreover, is inconsistent with the one power which Petitioners concede to the ICC: declaring *rates* on past motor carrier shipments to be unreasonable (Petitioner Br. at 23). Former § 204a of the Interstate Commerce Act, cited by Petitioners as the source of the ICC's powers to declare past motor carrier rates unreasonable, stated that such findings of past unreasonableness were to be made "upon complaint made as provided in [former] § 216(e)." Former 49 USC § 304a(5). The present 49 USC § 10704(b)(1) is the recodified version of the former § 216(e). Historical and Revision Notes following 49 USC § 10704, 49 USCA Transportation [Partial Revision], 1989 Pamphlet at 261. Petitioners' argument that 49 USC § 10704(b)(1) applies only to future shipments would serve to destroy the remedy for past unreasonableness of rates described at pages 18-23 of Petitioners' Brief.

was designed to prevent — discrimination between shippers — had been reduced in practical significance by substantial increases in carrier rate flexibility adopted after the Motor Carrier Act of 1980. *Negotiated Rates I, supra*, 3 ICC 2d 104. The ICC decided that assignment of controlling weight to prior negotiations or misrepresentation would be granted only on a case-by-case basis, reflecting the particular facts of individual situations. *Id.* at 106, 107. On a particular record, if it could be shown that a shipper-carrier negotiation of rates without a subsequent carrier rate filing was effected to obtain discriminatory treatment, the ICC would be free to reject a finding of unreasonable practices and protect the policies of 49 USC § 10761. As the ICC noted, its right to change its interpretation of statutes to meet changing factual or policy situations is clearly established by decisions of this Court in *Chevron U.S.A., Inc.* v. *Natural Resource Defense Counsel*, 467 U.S. 837 (1984) and *American Trucking Associations, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).[5]

There is no merit to Petitioners' argument that shipper rights to damages for past unreasonable practices are barred by this Court's decision in *T.I.M.E., Inc.* v. *U.S.*, 359 U.S. 464 (1959). The Court's holding in *T.I.M.E.* must be construed in light of its holding on

[5] Petitioners are incorrect in their suggestion argument that rejection or diminution of the ICC's rate reasonableness powers is dictated by this Court's decision in *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 486 U.S. 409 (1986). *Square D* makes three specific references confirming the powers of the ICC to set aside rates contained in published tariffs. *Id.* at 416; 416 n. 18; 418 n. 22. One of these references is a lengthy footnote describing the unreasonableness remedy available to shippers before the ICC and citing the existence of this remedy as the basis for barring parallel remedies under the antitrust laws. *Id.* at 416, n. 22. Any suggestion that *Square D* constitutes authority for the proposition that a filed rate may not be set aside by the ICC is simply incorrect.

similar issues three years later in *Hewitt-Robins* v. *Eastern Freight-Ways, supra*, 371 U.S. 84. While *Hewitt-Robins* did not disturb the specific holding of *T.I.M.E.*, the rationale and discussion in *Hewitt-Robins* provides a significantly narrower rationale for the *T.I.M.E.* result than that set forth in the *T.I.M.E.* opinion. Indeed, two members of the five member majority in *T.I.M.E.*, Justices Harlan and Stewart, protested in dissent that much of the *Hewitt-Robins* rationale was inconsistent with the rationale expressed in *T.I.M.E.*. *Hewitt-Robins, supra* at 371 U.S. 89-93.

Hewitt-Robins holds that the ICC is authorized to make findings in aid of courts as to the reasonableness of past motor carrier practices, when such issues are raised in defense of carrier actions to collect freight charges. In *Hewitt-Robins*, the shipments moved between points in one state over interstate routes. The rate sought to be collected by the motor carrier was the published interstate rate. The *Hewitt-Robins* shipper, however, claimed that it was required to pay only a lower rate which would have been applicable had the shipments moved over an intrastate route. According to the shipper, the carrier had a common law duty to move its shipment over the cheapest available route. The *Hewitt-Robins* court found that the carrier's breach of this duty constituted an unreasonable practice and that the ICC had primary jurisdiction to evaluate that issue.

The *Hewitt-Robins* court conceded that, under *T.I.M.E.*, no common law remedy remained for recovery of past payments of unreasonably high freight charges. The Court found that these remedies had been extinguished because Congress had created a statutory system providing for advance notice and advance protesting of the unreasonableness of proposed rates.

Hewitt-Robins, supra, at 371 U.S. 87. In the case of unreasonableness of practices, however, the Court noted that no parallel statutory remedies had been created and thus the prior common law remedy survived. *Id.* at 87. Thus, while legislation was necessary to reinstate the post-shipment damage remedies for rate unreasonableness found non-existent in *T.I.M.E.*, no similar legislation was required with respect to post-shipment unreasonable practice remedies. Petitioners' arguments that the 1965 legislation in Pub. L. 89-170, 79 Stat. 651, September 6, 1965, failed to embrace unreasonable practices is rendered irrelevant by the fact that these remedies had continued in existence under *Hewitt-Robins*. Rather, that legislation served only to reestablish the parallel damage remedies involving past unreasonable rates which had existed prior to this Court's decision in *T.I.M.E.*.

The identical nature of damage remedies involving past unreasonable rates and past unreasonable practices also is reflected in the Congressional recodification of the Interstate Commerce Act in Pub. L. 95-473, 92 Stat. 1337, October 17, 1978. The recodification created unitary provisions to continue postshipment damage remedies applying to both unreasonable rates and unreasonable practices. See 49 USC §§ 10701(a), 10704(b)(1), 11705(b)(3), 11705(c)(1), 11706(c)(2). This combination of previously separate provisions regarding rate and practice unreasonableness was explained by the recodifiers as correcting variances and inconsistencies in the use of synonymous terms in the prior statute. See Historical and Revision Notes following 49 USC § 10101, 49 USCA Transportation [partial revision], 1989 Pamphlet, at 97-98. While recodification was not intended to alter the prior substantive law, the language chosen by Congress in recodification serves as a guide to the meaning of the original act. *Purolator Courier*

Corp. v. *ICC*, 598 F2d 225, 227 at n. 5 (D.C. Cir. 1979). Petitioners' arguments that the prohibitions of the *T.I.M.E.* case serve to bar damage remedies involving past unreasonable practices thus are without merit.

II.

SHIPPERS ARE ENTITLED TO RAISE ISSUES OF UNREASONABLE PRACTICES AS DEFENSES TO MOTOR CARRIER ACTIONS TO COLLECT FREIGHT CHARGES AND ARE NOT REQUIRED TO PAY THE CHARGES PRIOR TO CONSIDERATION OF THESE DEFENSES BY THE ICC.

The Court should also reject any notion in the cases below that unreasonable practice issues are not defenses to carrier actions to collect freight charges, or that shippers are required to pay such charges even while they are litigating the merits of such defenses before the ICC. Such suggestions are present in the opinion of the Fifth Circuit in *Supreme Beef Processors, Inc.* v. *Yaquinto, supra*, 864 F.2d 388, 391-92, and should be addressed by the Court as a part of its resolution of the legal issues in these cases. Both the courts and the ICC repeatedly have held that shippers are entitled to assert unreasonableness issues defensively. The Fifth Circuit has misapplied its own precedents and those of this Court in suggesting that the remedy pursued by Primary Steel and sought by Supreme Beef is barred by these parties' failures to seek this relief in separate legal actions against the bankrupt carriers.

It is well established that shipper defendants in carrier actions to collect freight charges are entitled to assert as defenses either the contention that the rates sought to be collected are statutorily unreasonable or that collection of these rates would constitute a statutorily prohibited unreasonable practice. *United States* v. *Western Pacific Railroad, supra*, 352 U.S. at 71-73

(statute does not "bar reference to the Commission of questions raised by way of defense"); *Western Transportation Co.* v. *Wilson & Co., supra,* 682 F2d at 1232 (separate claim procedures refer "only to actions seeking payment of money" and not to defenses). Given the fact that unreasonableness of rates and unreasonableness of practices under 49 USC § 10701(a) fall within the exclusive primary jurisdiction of the ICC, *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922); *United States* v. *Western Pacific Railroad, supra,* 352 U.S. 59, 68, the only forum in which these defenses may be addressed is the ICC.

In these circumstances, courts regularly have recognized that shippers pleading unreasonable rate or practice defenses to carrier collection actions in court are entitled to stays of the collection actions pending determination of their unreasonableness defenses by the ICC. *Western Transportation Co.* v. *Wilson & Co., supra,* 682 F2d at 1231, 1232; *Seaboard System R.R.* v. *United States, supra,* 794 F2d at 639; *Interoceanic Commodities Corp.* v. *Chicago G.W. Ry. Co.*, 309 ICC 710, 612 (1960); *Bushman Dock & Term.* v. *Chesapeake & O. Ry. Co.*, 302 ICC 183, 186 (1950). Both the courts and the ICC also have recognized specifically that unreasonableness of a rate or practice is an affirmative defense to a carrier collection action, as opposed to an independent claim to be raised by counterclaim or separate suit. *In Re Penn Central Transportation Co.*, 477 F2d 841, 844 (3rd Cir. 1973), cert. den., 414 U.S. 885, 923 (1974); *Lawson Concrete Co.* v. *C. & N.W. Transp. Co.*, 367 ICC 109, 111 (1982).

Notwithstanding early statements that shippers alleging rates to be unreasonable were required to first pay the rates and then file reparation actions to recover them, later ICC decisions eliminated this requirement

by granting specific approval to the carriers' non-collection of rates ultimately found to be unreasonable. See, i.e. *Bradford Coal Co.* v. *Baltimore & O. R. Co.*, 305 ICC 761, 766-67 (1959); *New England Box Co.* v. *Boston & M.R.*, 305 ICC 133, 135 (1958); *Foremost Food & Chemical Co.* v. *Alton & S.R.*, 318 ICC 35, 39 (1962). Indeed, any such rule appears to have been ignored more often than followed. *City of New Orleans* v. *Southern Scrap Material Co.*, 704 F2d 755 at 757 (5th Cir. 1983); *Seaboard System R.R., Inc.* v. *U.S., supra,* 794 F.2d at 639; *Indiana Harbor Belt R. Co.* v. *Industrial Scrap Corp.*, 682 F.Supp 1041, 1042 (N.D. Ill. 1986); *United States* v. *Western Pacific Railroad, supra,* 352 U.S. at 71-73; *Western Transportation Co.* v. *Wilson & Co., supra* 682 F2d at 1231-32; *General American Tank Car Corp.* v. *Eldorado Terminal Co.*, 308 U.S. 422, 433 (1940). In all of the cited cases, payment of rates on file with the ICC was deferred pending the ICC's determination of the reasonableness of rates or rate practices raised as defenses to payment.

There is no precedential support for statements such as those in the Fifth Circuit in *Supreme Beef* that "a court may not stay enforcement of the filed tariff rate on the ground that the shipper has pled unreasonableness" or that "a carrier is entitled to enforce the filed rates under the filed tariff doctrine and to seek payment of undercharges in the district court even while the reasonableness of the tariffs is challenged before the commission." *Supreme Beef Processors, Inc.* v. *Yaquinto, supra,* 864 F2d at 392, 391-92. The only case cited by the Fifth Circuit in support of these propositions is *Southern Pacific Transp. Co.* v. *City of San Antonio, supra,* 748 F2d 266. *Southern Pacific* arose out of this Court's opinion in *Burlington Northern* v. *U.S.*, 459 U.S. 131 (1982). It essentially enforced this Court's holding that reviewing courts lack the power to delay

the implementation of proposed rate increases found not to be unreasonable by the ICC. *Southern Pacific Transp. Co.* v. *San Antonio, supra,* at 748 F.2d 273.

In *Southern Pacific,* rail carriers filed collection actions against the shipper, the City of San Antonio, based upon tariffs reflecting rate increases which this Court had ordered left in effect pending the ICC's redetermination of a reasonable rate. A district court ruled that the rates provisionally approved by this Court and the ICC were the rates that should be applied. The court, however, stayed execution of its judgment to that effect pending the outcome of the ICC's reconsideration of those rates. *Southern Pacific, supra,* 748 F.2d at 269. The Fifth Circuit ordered that stay vacated. In principal part, the vacation order rested on the doctrine of non-interference with ICC jurisdiction expressed by this Court in its *Burlington Northern* opinion. *Southern Pacific, supra,* 748 F.2d at 273. The order also stated, however, that the filed rate system based on 49 U.S.C. § 10761(a), justified payment to the carriers of their filed charges provisionally approved by the ICC. *Id.* at 273-274 (*"Filed Rate Doctrine"*). This latter justification had not been expressed by the prior opinion of this Court in *Burlington Northern.*

The Fifth Circuit's citation of this portion of *Southern Pacific* in *Supreme Beef* as a basis for denying shippers their right to assert unreasonable practice defenses before the ICC represents a serious misapplication of this Court's *Burlington Northern* principles. *Burlington Northern* reflected this Court's concern that preventing *future* rate proposals from taking effect on the grounds of alleged unreasonableness would irrevocably prejudice carriers. Such prejudice would occur because of the carriers' lack of a remedy to recover revenue shortfalls from shippers for the period of litigation. *Burlington Northern* v. *U.S., supra,* at 459 U.S. 139, 141-143. This irreparable harm to carriers, however, is not present in cases in which unreasonableness of a rate or rate practice is raised as a defense to carrier actions to collect published charges on past shipments. In that situation, carriers will always retain their collection remedy against the shipper if the shipper does not obtain a determination of unreasonableness from the ICC. There is no indication in *Burlington Northern* that this Court intended to foreclose shipper rights to raise the unreasonableness defenses to actions to collect charges on past shipments which this Court had recognized in *United States* v. *Western Pacific Railroad, supra,* 352 U.S. 59. See also, Brief for the United States as *Amicus Curiæ* in No. 88-1958 (Dec., 1989 at 14-16).

Supreme Beef believes that affirmance of the Eighth Circuit decision below will resolve this issue as a matter of law. Primary Steel was permitted to litigate its unreasonableness practice arguments as a defense to the collection action by Maislin. It was not required either by the courts or the ICC to file a separate claim against Maislin or to pay over the amounts at issue pending the outcome of these proceedings. Supreme Beef maintains, however, that this Court's decision resolving this case should affirmatively confirm the rights of shippers to raise unreasonable practice issues as defenses to carrier collection actions and to stay any payment of the carrier charges at issue pending resolution of these defenses by the ICC. Such an affirmative holding would resolve any conflict between the law of the Eighth and Fifth Circuits on this point and eliminate future controversy in other circuits which might arise from the Fifth Circuit's opinion in *Supreme Beef.*

CONCLUSION

Supreme Beef Processors, Inc. respectfully requests that the determination of the Eighth Circuit be affirmed.

Respectfully submitted,

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